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NO. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

LEONARD T. KELLEY
Petitioner

vs.

STATE OF ALASKA
Respondent

PETITION FOR WRIT OF CERTIORAI TO THE COURT OF APPEALS OF ALASKA

PETITION FOR WRIT OF CERTIORAI

George Kapolchok
1029 W. 3rd Avenue,
Suite 550
Anchorage, AK 99501
(907) 278-8850

Supreme Court, U.S.
FILED
APR 1 1991
OFFICE OF THE CLERK

QUESTIONS PRESENTED

Whether Due Process of Law requires the State of Alaska, when using a civil standard of negligence in a criminal context to give the Defendant notice of the specific theory of negligence under which the charge is made.

PARTIES

The Parties before the Alaska Supreme Court were

Leonard T. Kelley
821 N Street, Suite 206
Anchorage, AK 99501
Appellant

State of Alaska
Attorney General
Box K
Juneau, AK 99811
Appellee

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PETITION FOR WRIT OF CERTIORAI

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OPINIONS BELOW

The October 3, 1990, Court of Appeals decision in State vs. Kelley is an unpublished opinion #2102. (See Appendix).

JURISDICTION

Jurisdiction in this Court exists by certiorai pursuant to 28 USC 1257.

STATEMENT OF THE CASE

BACKGROUND

In the case before the Alaskan Trial Court the Judge in making his decision applied the civil standard of negligence in a criminal case involving fishing in closed waters. The Petitioner was charged under Administrative Code 5 AAC 06.350. The Judge then introduced for the first time in the trial regulations 5 AAC 39.107(c) holding that the regulation asserted a duty to assist and supervise the operation of fishing. Additionally, the Judge introduced for the first time Regulation 5 AAC 39.240(e) holding that the effect of the regulation was to make the permit holder responsible for the operation of the net.

The Trial Court convicted Mr. Kelley of negligent fishing in closed waters determining that the negligence was consequence of breach of statutory law. This

breach arose from a violation of regulation 5AAC 39.107(c), "Operation of Gear" and 5AAC 39.240 "General Gear Specification and Operations". The Trial Court found that these regulations created a duty to supervise and assist in the setting of the nets; the court further found that Kelley had breached this duty and therefore, was negligent. It is important to note that the charge against Kelley was tried as a misdemeanor. Such a charge in Alaska asserts two separate offenses, a violation of strict liability arising from fishing in closed waters and the offense of negligence utilizing the standard of civil negligence. Kuzmin v. State, 725 P.2d 721 (Alaska App. 1986), Beran v. State, 705 P.2d 1280, 1285 (Alaska 1985). In the case before the court the complaint asserts as follows:

Leonard T. Kelley did negligently commercial fish in closed waters; to wit: that as the permit holder for the Fishing Vessel (F/V) BB-37, ADF&G #13712, he operated a commercial drift net approximately 2 3/4 miles into the closed waters north of the Kvichak River Commercial District.

All of which is a misdemeanor, being contrary to and in violation of 5AAC 06.350(b)(1), and against the peace and dignity of the State of Alaska.

This complaint is based upon the observations of Trooper Al Cain and Officer Tory Oleck who on July 6, 1989, at approximately 0600 hours, observed the F/V BB037, ADF&G #13712 operating their gillnet approximately 2 3/4 miles north of the northern Boundary of the Kvichak River Commercial Salmon District. Further based upon the Loran readings that Trooper Cain took at the scene which further showed that the F/V BB-37, was approximately 2.7 nautical miles into closed waters. Further based upon the Alaska Department of Fish and Game Bristol Bay Registration Certificate #0859 which shows that the defendant is the permit holder for the F/V BB-37, ADF&G #13712. This complaint is also based upon the investigation of the complainant.

PROCEEDINGS BELOW

Upon the Complaint Mr. Kelley was convicted. Mr. Kelley appealed with the State Court of Appeals and was denied relief. Mr. Kelley motioned the Court of Appeals for rehearing and was denied. Mr. Kelley moved the Supreme Court of Alaska for a hearing upon the matter and was denied. Upon this denial Mr. Kelley petitions for Writ of Certiorai.

I. THE APPLICATION OF A CIVIL STANDARD OF NEGLIGENCE IN CRIMINAL CASES REQUIRES SPECIFIC NOTICE OF THE TYPE OF NEGLIGENCE INVOLVED IN ORDER TO SATISFY THE CONSTITUTIONAL REQUIREMENT OF DUE PROCESS

In a landmark case the Alaskan Court of Appeals ruled that in criminal trials dealing with the issue of fishing in closed waters that the Civil Standard of Negligence would be used. Kuzmin v. State, 725 P.2d 721 (Alaska App. 1986) In the Civil Standard of Negligence in Alaska two possible theories exist. Negligence may be found upon a common law standard of reasonableness or upon a finding of negligence per se utilizing the notion of statutory duty and breach. Swenson Trucking & Excavating Inc. v. Truckweld Equipment Co., 604 P.2d 1113 (Alaska 1980), Appeal after remand 649 P.2d 234; Dahle v. Atlantic Richfield Co., 725 P.2d 1069 (Alaska 1986).

In establishing due process standards the United States Supreme Court has found that a person's right to reasonable notice of the charge against him is a basic right of our system of jurisprudence, In re Oliver, 333 U.S. 257, 273, 68 S Ct 499, 507, 92 L.Ed 682 (1942). Brany Adams, 749 P.2nd 366, 367 (Alaska 1988), Alto v. State, 566 P.2nd 630 (Alaska 1977). In measuring the fairness of a trial the Court has determined that the standard is one of a meaningful opportunity to offer a complete defense, Crane v. Kentucky, 476, U.S. 683, 688, 106 S.Ct 2147, 2146, 90 L.Ed 636 (1986); such a ruling obviously encompasses the notion that one may not convict upon a charge not tried. Jackson v. Virginia, 443 U.S. 307, 313, 99 S. Ct 2781, 2786, 61 L. Ed 2nd 560 (1979).

In the case before the Court Leonard T. Kelley was tried upon a Complaint asserting negligent fishing in closed waters a violation of law and thereby being criminally liable. The Complaint did not specify which theory of negligence (Common Law or Statutory) Mr. Kelley was to be tried under. Additionally, Leonard T. Kelley was never advised in any fashion during the trial that his negligence case was being measured by violation of any regulation other than that cited in the Complaint. Yet his conviction arose upon a finding that Leonard Kelley had violated additional regulations. Consequently, the essential facts considered for the prosecution and necessary for a defense were not presented in the Complaint nor in the trial. Consequently, the ability to defend was severly hampered prior to the trial.

Additionally the additional regulations were not argued at trial. However, at the end of the trial the court held forth that it would apply the civil standard of negligence, and did not designate a theory of negligence. Having made this statement the court then applied a theory of negligence arising from previously uncited statutory violations. This failure of notice prevented Leonard Kelley from fully defending himself and is a breach of due process.

The Court of Appeals has maintained that these uncited regulations were used by the court only to satisfy the standard of reasonableness. This conclusion generates an unacceptable ambiguity regarding notice. Under this theory a person charged with a criminal offense must accept that in

establishing his guilt both common law standards and statutory law may be used without prior notice to establish guilt. This makes defense burdensome, expensive and may overwhelm the defendant with unexpected tactics.

The issue is one of fairness and notice. Should the trial court hold that negligence is found upon statutory violation without the complaint or pleadings asserting such a notion, the defendant may find himself guilty without ever having an opportunity to respond directly to the charge.

In the instant case the defendant was convicted of negligence arising from a breach of regulations. Hence, the defendant was due notice of the applicable statutes prior to a finding of negligence resulting from their breach.

CONCLUSION

The Supreme Court of Alaska has ignored its own ruling regarding due process in criminal cases and permitted the use of civil standars of negligence without reqiring specificity of theory. This lack of specificity generates tension and ambiguity in defense which prevents meaningful opportunity to fully defend.

RELIEF SOUGHT

For the above reasons, Petitioner respectfully requests that a Writ of Certiorai be issued to review the October 3, 1990, decision of the Court of Appeals for the State of Alaska.

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THE COURT OF APPEALS OF THE STATE OF ALASKA

LEONARD THOM KELLEY,)
) Court of Appeals
No. A-3312
Appellant,) Trial Court No.
3NA-S89-164CR
v.)
) MEMORANDUM
OPINION
STATE OF ALASKA,)
) AND JUDGMENT*
Appellee.)
) [No. 2102 -October
3, 1990]

Appeal from the District Court of the State of Alaska, Third Judicial District, Naknek, John Reese, Judge.

Appearances: Carl Frasure, Anchorage, for Appellant.
Diane T. O'Gorman, Assistant District Attorney, Dwayne W. McConnell, District Attorney, Anchorage, and Douglas B. Baily, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats, Judge, and Andrews,** District Court Judge.

Coats, Judge.
Bryner, Chief Judge, concurring.

District Court Judge John Reese convicted

Leonard Thom Kelley of the misdemeanor offense of negligent commercial fishing in closed waters, 5 AAC 06.350(b)(1). The Court imposed a fine of $15,000 with

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*Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

**Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

1 AS 16.0525(1)(2) authorizes the board of Fisheries to promulgate regulations establishing "open and closed seasons and ares for the taking of fish."

$7,500 suspended and a penalty of $3,000 for Kelley's share of the profit from the fish. The court also placed Kelley on probation for two years. Kelley appeals his conviction and sentence. We affirm.

At trial, Alaska State Trooper Cain testified that on July 6, 1988, while working undercover, he observed the fishing vessel BB037, ADF&G No. 13712, operating a gill net approximately 2 3/4 miles north of the northern boundary of the Kvichak River Commercial Salmon District. According to the trooper, there were three individuals on the boat attempting to pull a severally tangled net containing fish out the water.

Alaska State Trooper Jerry Shanahan testified that he interviewed Kelley on July 8, 1989. Kelley informed the trooper that he was the permit holder of the vessel and that

he had been fishing in the Kvichak district on July 6, 1989.

Kelley testified that on May 2, 1989, he entered into a contract with Joseph Tarabochia for the 1989 fishing season whereby Tarabochia would provide the fishing vessel and the crew, Kelley would provide the fishing permit, and the parties would then share an agreed upon portion of the profits from the fish catch. Kelley also explained that he suffers from problems with seasickness. According to Kelley, on the date in question, he had become seasick and gone below to sleep, and the boat then apparently drifted past the boundary marker while he was asleep. Kelley testified that when he awoke and returned to the deck, he discovered that the fishing net was so tangled, he could not start the boat's engine and he was forced to drift. Kelley

further testified that he has been a fisherman since 1972 and that he had fished the Kvichak River area before and was familiar with its boundary markers.

The court concluded Kelley "was negligent to fish knowing that he may be disabled and unable to come up and assist and supervise the immediate operation." In reaching its decision, the court noted 5 AAC 39.107(c). requires that the permit holder "personally operate or assist int he operation of mobile net gear," while 5 AAC 39.240(e) provides that the permit holder "is responsible for the operation of the net."

In Beran v. State, 705 P.2d 1280 (Alaska App. 1985), we held that the breach of a fish and game regulation constitutes a misdemeanor, punishable by imprisonment, only

upon a finding of mens rea. Otherwise, the breach constitutes a strict liability "violation" and is punishable only by a non-criminal fine. Id. at 1291 n. 13.

On appeal, Kelley contends the complaint provided notice that he was charged only with a strict liability violation rather than a misdemeanor crime. In Kelley's view, the complaint failed to inform him of "the nature and cause" of the offense. Kelley points out the complaint makes no mention of either 5 AAC 39.107(c) or 5 AAC 39.240(e), both relied upon by the trial court in convicting him.

Kelley's argument is unpersuasive. The complaint clearly advised Kelley that he was charged with a misdemeanor; the complaint informed Kelley of the requisite mens rea in that it plainly states "Leonard T. Kelley did

negligently commercial fish in closed waters." Moreover, during his opening statement, defense counsel conceded that Kelley was guilty of fishing in closed waters under a strict liability theory but argued that he could not be convicted of a misdemeanor offense because his actions were not intentional or negligent. During closing argument, defense counsel attempted to persuade the court to conclude that Kelley's going to sleep did not constitute negligence. The arguments of the parties at trial thus made it clear that Kelley was well aware of the fact that he was charged with a misdemeanor and that one of the underlying bases of the negligence charge was his going to sleep for four hours. See Criminal Rule of Procedure 3 ("complaint is a written statement of the essential facts constituting the

offense charged"); Thomas v. State, 552 P.2d 528, 530 (Alaska 1974) (purpose of indictment is "to furnish the accused with a description of the charge against him to enable him to prepare his defense and to permit him to claim double jeopardy in the future should he again be charged with the same offense").@

The fact that Kelley had no specific notice of 5 AAC 39.107(c) or 5 AAC 39.240(e) does not alter this result. Kelley was not charged with violating either 5 AAC 39.107(c) or 5 AAC 39.240(e). The court looked to these provisions only to establish the duties that are expected of a reasonable fisherman. The provisions thus served to bolster the court's ultimate conclusion that Kelley's going to sleep for four hours constituted negligence.

Kelley also contends the court utilized a civil standard of negligence without proper notice to him. Kelley's argument is again unpersuasive. We have previously held that misdemeanor convictions for commercial fishing violations may be supported by proof of ordinary civil negligence, as opposed to the stricter standard of criminal negligence. Reynolds v. State, 655 P.2d 1313, 1315 (Alaska App. 1982); See also Beran, 705 P.2d at 1292. The state's prosecution of Kelley's case as a misdemeanor should thus also have put Kelley on notice that an ordinary civil negligence standard would apply.

Kelley next contends the state committed discovery violation which warrants reversal. The state called Alaska State

Trooper Jerry Shanahan to testify concerning his interview with Kelley on July 8, 1989. Kelley objected on the ground that he had recently learned the state had failed to produce a handwritten report made by the trooper following the interview. Kelley acknowledged that he had received a typewritten report of the interview well in advance of trial. However, in Kelley's view, he was also entitled to the handwritten report in order to verify that the typewritten report was accurate.

The court overruled the objection, concluding that Kelley had had ample time to verify whether the state had complied with his discovery request.

On appeal, Kelley contends the discovery violation precluded him from adequately defending himself because, in

Kelley's view, his conversation with Trooper Shanahan constituted the only proof which placed Kelley at the scene of the crime. Kelley contends the court's failure to grant a continuance so that he could obtain a copy of the document consituted an abuse of discretion.

We need not reach a determination of the merits of this issue because, in our view, any error was harmeless. Kelley testified that he was at the scene. Accordingly, the court's refusal to grant a continuane in order to allow Kelley to have access to the handwritten report in order to prove that he was not at the scene, if error at all, was harmless.

Kelley next contends the evidence was insufficient to support his conviction. In determining whether the evidence is sufficient to sustain a

conviction, the evidence is to be viewed in the light most favorable to the state. A finding of guilt must be supported by substantial evidence -- "such relevant evidence which is adequate to support the conclusion by a reasonable mind that there was no reasonable doubt as to the appellant's guilt." Hughes v. State, 513 P.2d 1115, 117 (Alaska 1973).

The testimony presented at trial, when viewed in the light most favorable to the state, was more than adequate to support Kelley's conviction. Kelley testified that he had fished commercially for approximately 20 years and that he had previously fished in the Kvichak area and was familiar with its boundary markers. Despite his tendency to get seasick, he commercially fishes every year. Under the circumstance, we cannot say the

court's finding is clearly erroneous that Kelley was negligent in commercially fishing knowing that he was subject to becoming seasick so that he would be unable to supervise the immediate operation of the vessel.

Finally, Kelley contends his sentence is excessive. Kelley points out that he was asleep when the vessel sailed into closed waters and so he did not intentionally participate in the violation. Kelley further notes he has no prior record and he expressed remorse for his involvment in the offense.

In sentencing Kelley, the court concluded the maximum fine was appropriate because Kelley, the court concluded the maximum fine was appropriate because Kelley was "so far" away from the open fishing area. The court further noted that Kelley slept an

"excessive" period without making sure "business [was] taken care of." Finally, the court pointed out Kelley did not call the authorities to report that the tangled net prevented him from taking immediate action to leave the closed area. Instead, Kelley proceede to sell the illegally caught fish.

We do not need to detemine whether the court erred in characterizing Kelley as a worst offender under these facts. We believe these findings justify the court's sentence. In reaching this decision, we note that Kelley's sentence --a $15,000 fine with $7,500 suspended and no jail time -- fell well below the maximum sentence permitted by AS 16.05.723, a year in jail and a $15,000 fine.

The conviction and sentence are AFFIRMED.

BRYNER, Chief Judge, concurring.

I join in the court's decision on the merits but would decline to consider Kelley's sentence appeal. Under AS 12.55.120(d) and Alaska Appellate Rule 215(a) this court has authority to consider a sentence appeal only in cases involving sentences of imprisonment. Kelley does not claim that the fine he received is unlawful, only that it is excessive. In ruling on Kelley's sentencing arguments, the majority of the court, without apparent basis, simply ignores the unambiguous language of the statute and rule. The court's casual disregard of squarely applicable law establishes poor precedent and can only encourage similar disregard by future litigants.

IN THE SUPREME COURT OF THE STATE OF ALASKA

LEONARD KELLEY,	)	
	)	Supreme Court
	)	No. S-4278
Petitioner,	)	
	)	ORDER
v.	)	
	)	
STATE OF ALASKA,	)	
	)	
Respondent.	)	
	)	

Superior Court No. 3AN-89-164 Cr.
Court of Appeals No. A-3312

Before: Pabinowitz, Chief Justice, Burke Matthews, Compton and Moore, Justices.

On consideration of the petition for hearing, filed on November 15, 1990, and the errata to the petition, filed on November 16, 1990, and the response to the petition, filed on January 11, 1991,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on Jauary 30, 1991.

David A. Lampen

DAVID A. LAMPEN, SR.
Clerk of the Supreme Court

ALASKA ADMINISTRATIVE CODE: FISH AND GAME

5 AAC 06.350. CLOSED WATERS.

(a) The following locations in the Nushagak District are closed to the taking of salmon:
(1) those waters north of a line from and ADF&G regulatory marker located two miles south of Bradford Point to an ADF&G regulatory marker on Nushagak Point;
(2) repealed 4/22/88;
(3) the Snake River Section from June 1 to 9:00 a.m. July 17;
(4) those waters of the Snake River upstream of 58 degree 52" 48" N. lat. as indicated by ADF&G regulatory markers;
(5) those waters of the Igushik River upstream of 58 degrees 43" 36" N. lat. as indicated by ADF&G regulatory markers.

(b) The following locations in the Naknek-Kvichak District are closed to the taking of salmon:
(1) those waters northeast of a line from an ADF&G regulatory marker located near Graveyard Point to 58 degrees 53" 22" N. lat. 157 degrees 14' 16" W. long;
(2) those waters of the Naknek River upstream of a line between ADF&G regulatory markers located near the terminus of the river;
(3) by set gill nets along the southeast shore of the Naknek section from the Naknek-Kvichak District boundary north to 58 degrees 37' 09" N. lat, 157 degrees 15' 18" W. long.;

(c) The following locations in the Egegik District are closed to the taking of salmon:
(1) those waters of the Egegik River upsteam of a line between ADF&G regulatory markers located just downstream of the westernmost tip of Egg Island;
(2) all waters of the King Salmon River upstream from ADF&G regulatory markers located on both sides of the river's mouth.

(d) Those waters of the Ugashik River upstream of a line between ADF&G regulatory markers located just downstream of the confluence of the Ugashik and King Salmon Rivers are closed to the taking of salmon, except that set gillnets maybe used to take salmon along that portion of the east bank of the Ugashik River from 200 yards north of the Wingard cannery to a point 1,200 yards north of that cannery.

(e) The following locations in the Togiak District are closed to the taking of salmon:
(1) those waters of the Togiak River upstream of a line from an ADF&G regulatory marker located near the Togiak Fisheries cannery to an ADF&G regulatory marker located near the Togiak school;
(2) those waters of the Kulukak River upstream of a line between ADF&G regulatory markers located near the old Kulukak village.

(f) Salmon may not be taken in any locations that are not describe in 5 AAC 06.200, except as allowed in 5 AAC 06.330. (In effect before 1982; am 4/14/82, Register 82; am 4/16/83, Register 86; am 5/11/83, Register 94; am 4/22/88, Register 105)

Authority: AS 16.05.251

ALASKA ADMINISTRATIVE CODE: FISH AND GAME

5 AAC 39.107. OPERATION OF GEAR
(a) Each fisherman shall operate or assist in operating only one type of net hear at any one time.

(b) Throughout the period of operation of mobile net gear, a person who holds a valid CFEC permit for that gear must be physically present on board the vessel from which the net gear is operated.

(c) A CFEC permit holder shall personally operate or assist int he operation of mobile net gear. "Personally operate or assist in operation" means assisting or supervising some portion of the immediate operation.

(d) No person may operate or assist in the operation of net gear unless the CFEC permit holder is in compliance with this section and AS 15.05.253.

(e) A person who holds a CFEC permit for the operation of stationary net gear or fishwheels shall be within a reasonable distance of the gear when at a point of sale or at the location of other stationary gear of that permit holder. A "reasonable distance" means a distance that ensures that the CFEC permit holder retains competent supervision of the gear. (In effect before 1983; am 4/16/83, Register 86; am 5/31/85, Register 94, am 4/18/86, Register 98).

Authority: AS 16.05.251
AS 16.05.253

5 AAC 39.240 G E N E R A L G E A R SPECIFICATIONS AND OPERATIONS

(A) A salmon fishing vessel shall operate, assist in operating, or have aboard it or any boat towed by it, only one legal limit of salmon fishing gear in the aggregate except as otherwise provided in this title.

(b) Unhung gear sufficient for mending purposes may be carried aboard fishing vessels.

(c) A purse seine, hand purse seine or beach seine may not be fished simultaneously with gill net gear by any individual or vessel.

(d) Salmon fishing nets must be measured, either wet or dry, by determining the maximum or minimum distance between the first and last hanging of the net when the net is fully extended with traction applied at one end only.

(e) The interim-use or entry permit card holder is responsible for the operation of the net. (In effect before 1985; am. 5/31/85, Register 94)

Authority: AS 16.05.251

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or propety, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United State and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United State, Representatives in Congress, the Executitve and Judicial officers of a State, or the member of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therin shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.